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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

No. 834

FRANK NICK ZIZZO, ALEXANDER STASNICK, HUGO A. LAZZARESCHI AND WALTER WOJCIECHOWSKI,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, Frank Nick Zizzo, Alexander Stasnick, Hugo A. Lazzareschi and Walter Wojciechowski, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

### JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on August 28, 1963, and is not reported, but appears in the printed Appendix filed with, and certified by the

Clerk of the United States Court of Appeals for the Seventh Circuit as a part of this record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on October 19, 1964. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

## JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was filed on the 19th day of October, 1964. On December 16, 1964, it was ordered that the petition for rehearing be denied. (These orders appear in the Appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED.

1. Did not the Court err in sanctioning the use of evidence compelled by registration provisions of the Wagering Tax Act to be used as evidence of constructive knowledge of interstate travel and of intent to engage in gambling activities in a prosecution for interstate travel with intent to thereafter engage in state prohibited gambling, all in violation of 18 U. S. C. 1952, a federal law which was passed subsequent to this Court's decision in *U. S.* v. *Kahriger*, 345 U. S. 22 and *Lewis* v. *U. S.*, 348 U. S. 419.

2. When under then prevailing law (*Kahriger* v. *U. S.* and *Lewis* v. *U. S.*) registration could not be incriminatory and the defendants in reliance thereon did not invoke their

constitutional rights can their registration be used as evidence of their guilt under a subsequently enacted federal statute.

3. Did not the Court of Appeals err in holding that compelled registration admissions under 26 U. S. C. 4411 and 4412 (The Wagering Tax Act) could be used against these defendants in a prosecution for violation of another federal statute, to-wit: 18 U. S. C. 1952, in direct violation of the Fourth and Fifth Amendments to the Constitution of the United States and in direct conflict with this Court's recent decisions in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, and *Malloy* v. *Hogan*, 378 U. S. 1, concerning the use of compelled evidence against defendants.

4. Does not the enforcement of the Wagering Tax Act and the interstate travel law (18 U. S. C. 1952) constitute an unconstitutional encroachment upon the police power of the State of Indiana, and a probable violation of the Ninth and Tenth Amendments to the Constitution of the United States.

5. In a matter concerning local law violations which, under the Constitution, the Congress does not have a right to regulate, may the Congress regulate indirectly by restraining the Constitutional right to personal travel freely through the United States.

6. Can a federal law make a state law violator a captive within the state without process or complaint or indictment?

7. Did not the Court of Appeals err in refusing to hold that the travel provisions of Section 1952, Title 18, U. S. C., broadly interpreted by the government under the facts of this case, constituted an exercise of power not delegated to the United States, and violated the privileges and im-

munities of the citizens of the states and of the United States, and that the statute is unconstitutionally vague.

8. Did not the Court err in affirming the conviction of the defendant Zizzo who did not travel out of Indiana himself, but who was convicted of aiding and abetting the short daily travel of three employee defendants to and from their homes, particularly where such travel in no way facilitated the unlawful activity and the fact of such residence in Illinois and travel to work in Indiana was of no consequence to the defendant Zizzo, and was only constructively proved to be known to him by use of compelled registration documents.

## STATUTES INVOLVED.

**Title 18, Section 1952. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises:**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics,

or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, Sec. 1(a), Sept. 13, 1961, 75 Stat. 498.

**18 U. S. C. Section 2. Principals:**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, Sec. 17b, 65 Stat. 717.

**26 U. S. C. Section 4411. Imposition of Tax:**

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

**26 U. S. C. Section 4412. Registration:**

(a) *Requirement*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name, place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company*—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) *Supplemental information*—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

**STATEMENT OF THE CASE.**

The defendants were indicted in a twenty-count indictment. Counts 2 through 19 charged violations of Sections 1952 and 2, Title 18, U. S. Code, in that they did travel in interstate commerce with intent to carry on an unlawful activity, to-wit: gambling and aiding and abetting the same. Count 1 charged the defendants with conspiring to violate Section 1952, Title 18 U. S. Code. However, all defendants were acquitted of this charge at the close of the evidence. Count 20 charged a violation of Sections 203 and 501, Title 47, U. S. Code. This charge was dismissed on motion of the Government. Counts 10, 11 and 12 were dismissed by the Court on motion of the Government at the close of the Government's evidence. The jury returned verdicts convicting defendant Zizzo on Counts 2 through 9, and 13 through 20; defendant Stasnick on Counts 2 through 8; defendant Lazzareschi on Counts 17 through 19, and defendant Wojciechowski on Count 9 and Counts 13 through 16.

On August 28, 1963 the defendant Frank Nick Zizzo was

sentenced to five years on each of said fifteen counts, to run concurrently, and was fined $10,000.00; the defendant Alexander Stasnick was sentenced to two years, on each of Counts 2, 3, 4, 5, 6, 7 and 8, to run concurrently, six months of which sentence are to be served, the balance suspended, and the defendant placed on probation for eighteen months, and fined $2,000.00; the defendant Walter Wojciechowski was sentenced to two years on each of Counts 9, 13, 14, 15 and 16, to run concurrently, six months of which sentence are to be served, the balance suspended, and the defendant placed on probation for eighteen months, and fined $2,000.00, and the defendant Hugo A. Lazzareschi was sentenced to two years on each of Counts 17, 18 and 19, to run concurrently, six months of which sentence are to be served, the balance suspended, and the defendant placed on probation for eighteen months, and fined $2,000.00; all said sentences to be subject to the provisions of Section 4208(a)(2), Title 18, United States Code.

The errors complained of were:

The statute under which the charges were brought, 18 U. S. C. A. 1952, is unconstitutional; the Court erred in denying the motion to dismiss the indictment and the motion in arrest of judgment; the Court erred in denying the timely motion to suppress certain evidence, and in permitting such evidence to be introduced at the trial; the Court erred in its rulings on compliance with 18 U. S. C. 3500; the Court erred in the giving and refusing of instructions; the prosecutor committed prejudicial misconduct on final argument; the verdict is not supported by substantial evidence and therefore, the Court erred in denying the motions for judgment of acquittal.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, and denied the defendants' petition for rehearing.

## STATEMENT OF FACTS.

After the return of the indictment against these defendants on June 26, 1962, pre-trial motions to dismiss and for discovery and inspection were made and denied.

A motion to suppress evidence was made, and evidence was taken at a hearing on April 25, 1963. This motion was denied.

The motion to suppress evidence alleged that the defendants were informed and believed that the United States intended to use as evidence information contained in applications, returns, documents and records filed by the defendants, pursuant to the provisions of Sections 4401, 4411 and 4412 of Title 26, United States Code, and regulations thereunder, together with other documents and information obtained therefrom, and leads emanating therefrom. It was alleged that, during the period covered by the indictment, the petitioners were filing reports and returns, and were paying taxes, pursuant to the said Sections. Subsequent to the passage of said Revenue Acts, the Congress of the United States passed 18 U. S. C. 1952, which provides that anyone who travels in interstate or foreign commerce, with intent to promote, manage, establish, carry on, or facilitates the promotion, management, establishment or carrying on of any unlawful activity, shall be subject to certain penalties. In this last cited statute, an unlawful activity is defined as any business enterprise involving gambling, etc. This law became effective Sept. 13, 1961.

The Motion to Suppress alleged that the defendants had been required under United States revenue statutes, to wit, 4401, 4411 and 4412, to give certain information, pursuant to the enactment of said revenue statutes, and, in accordance with said laws, had been compelled to become witnesses against themselves, in contravention to the pro-

visions of the Fifth Amendment to the Constitution of the United States; that these defendants were thereby subjected to an unlawful search and seizure, contrary to the provisions of the Fourth Amendment.

During the course of the taking of testimony on the hearing on the motion to suppress on April 25, 1963, FBI Agent Doyle, who was the head of the unit investigating these defendants, stated that he was first assigned to this matter "in about January of 1961 as it pertained only to Mr. Zizzo" (App. 35). That on January 3, 1962, he met with Richard Poppa, Special Intelligence Unit, Internal Revenue Service. Agent Doyle asked Mr. Poppa what forms Mr. Zizzo filed, as far as the Internal Revenue Service was concerned, and was advised by Mr. Poppa that Zizzo had filed an 11-C, a wagering tax registry, and, at that point, gave Mr. Doyle the names of the persons for whom Mr. Zizzo had purchased stamps, in addition to his own. Mr. Doyle admitted that he was not sure prior to this conversation that Lazzareschi was working for Zizzo. He was under the impression that Lazzareschi lived in Hammond. As to Wojciechowski, Doyle had never heard of him, prior to his talk with Agent Poppa.

The Court held that the registration provision of the Wagering Tax Act is not a violation of the prohibition against self-incrimination, contained in the Fifth Amendment, as rejected in *United States* v. *Kahriger*, 345 U. S. 22 (1953) and in *Lewis* v. *United States*, 348 U. S. 419 (1955). The Court was of the opinion that the applications of the defendants for gambling stamps are admissible in evidence to show a future intention to engage in wagering activities. The Court also stated that the motion to suppress did not involve any Fourth Amendment question (See Court's Memorandum, App. 85-87).

Government Exhibits 1, 2, 3 and 4 are such records as

are required to be filed under the wagering statutes, and constituted the principal evidence that the defendant Zizzo was aware of the residence of the defendant Wojciechowski.

As required by Indiana law, Zizzo filed Indiana Employers' Withholding Tax Return Forms. For 1961, this return listed Wojciechowski, Lazzareschi and Stasnick as Illinois residents. A similar return for 1962 gave Illinois addresses for Wojciechowski and Lazzareschi. Objections to the admission of these documents were made during the course of the trial, on the grounds raised in the motion to suppress.

Shortly prior to trial, the defendants made two motions to compel election. One was that the plaintiff elect which conspiracy it intended to proceed upon. One conspiracy was charged in Count One, and the other was charged in Count Twenty. The government elected to dismiss the conspiracy in Count Twenty.

Another motion to compel election was made with reference to which of the Burns' Indiana Statutes (1956 Replacement) the government intended to proceed upon. Each count of the indictment alleged violations of Sections 10-2304, 10-2307, 10-2310, 10-2311, 10-2331 and 10-2333. The defendants had already moved that the counts be dismissed for insufficiency in law and duplicity, as the statutes were not further described in the indictment, and were so pleaded that it was impossible for the defendants to determine what statute of the State of Indiana they were claimed to have violated. The Court denied this motion to compel the election.

## THE TRIAL EVIDENCE.

The government called 31 witnesses, who were divided into four principal categories. There were four landlords; nine employees of the defendants; eight bettor witnesses; seven agents of the Federal Bureau of Investigation; one Chicago police officer; one employee of the Commonwealth Edison Company and one employee of the Illinois Bell Telephone Company were the remaining witnesses.

Witnesses Brandys, Siwy Nardi and Goot were witnesses who rented certain premises to Frank Zizzo for bookmaking purposes. The witnesses Kulik, Kelly, Goodman, Adams, Suranich, Misolek, Johnson and Thompson were all persons who worked, at one time or another, for the defendant Frank Zizzo in bookmaking establishments at various locations. Some of these employees were paid weekly, and others were paid on a commission basis. On the latter whatever balance was struck between ins and outs—meaning money bet as against money paid out—the witness would receive 50% of the net winnings at the end of the month.

The witnesses Kozarek, Benko, Cada, Stanish, Hopkins, Pazanin, Prucy and Desatnick were all "bettor" witnesses. Not one could identify any specified time or date upon which they made bets with the various defendants or employees of the defendant Zizzo. Some said they visited the premises, and others said that they called in the bets over the telephone. Most of these persons were employed in and around the Hammond and Whiting, Indiana area.

Agents Asdel, Sawyer, Watts, Casey, Jefferis, Grubb and Doyle all testified to a large number of physical surveillances conducted by them, in which they followed the defendants Wojciechowski, Lazzareschi and Stasnick to and from their residences in Chicago, Illinois and certain bookmaking establishments in Hammond and Whiting, Indiana.

At no time did one of these agents testify that the defendant Frank Zizzo ever left the State of Indiana. At no time did any of these agents testify to seeing a bet made or placing a bet themselves with any of the defendants, or any of the employees of the defendant Frank Zizzo.

The police officer, Captain O'Neill, testified as Commander of the Fourth Police District in Chicago, Illinois that Hegewisch was a community of Chicago.

The witnesses Asche and Meyers, employees of Commonwealth Edison Company and Illinois Bell Telephone Company respectively produced certain records which tended to prove that persons by the name of Wojciechowski, Lazzareschi and Stasnick were users of Commonwealth Edison Company electric service and Illinois Bell Telephone service at the various residences which they were observed entering and leaving from time to time during the physical surveillance, conducted by agents of the Federal Bureau of Investigation.

In addition to the physical surveillance conducted by the agents, several of the agents had conversations with some of the defendants. Agent Asdell stated that Lazzareschi told him that he did not know where Mr. Zizzo lived, and that Mr. Zizzo had never been to his residence in Chicago, Illinois. Agent Doyle interviewed Alex Stasnick, who told him that he resided in Chicago, Illinois; had lived there for approximately five years, and had been working in various bookmaking establishments in Hammond and in Whiting, Indiana. He also interviewed Wojciechowski who, he said, told him that he lived at the address in Chicago, Illinois, where he had resided for a number of years; and that he had been working for many years as a bookmaker in Hammond, Indiana; and that he worked every day from January 1, 1962 until April 14, 1962; and that he traveled daily from Illinois to Indiana, where he accepted horse bets during his employment.

Of substantial importance to this case was the testimony of the witness, Howard W. Duncan, who was the accountant for Frank Zizzo. This witness testified (over the objections of the defendants, and a motion to suppress made and renewed) as to the documents which were produced by this witness. The motion to suppress was denied. The Court noted a continuing objection to all documents produced by this witness. Howard Duncan testified that he knew all of the defendants, and had been employed as an accountant for Mr. Zizzo since 1957. The business of Mr. Zizzo was horse betting, and the duty of this witness was to see that all taxes were paid. He testified that Zizzo's headquarters were at 1612-119th Street in Whiting, Indiana. This witness did all of the payroll work and withholding deductions. Each week he picked up the withholding taxes from the various employees. This included State gross income tax withholdings. He testified that at times the bookmaking activities moved around a bit at different locations. He was familiar with the operation at 4540 Hohman Avenue in Hammond, Indiana, but he could not definitely say when this place was running. He prepared all forms Mr. Zizzo was required to make, and all applications for gambling stamps. He made the quarterly Social Security report on form 941. He also filed schedule A to form 941. These taxes were paid out of the withholding deposits in the bank. He filed the occupational tax returns, which were Form 730, monthly, together with the taxes due on the wagers. He filed form 11-C for Frank Zizzo, which listed all of his agents, or persons working for him. He filed a quarterly tax return for unemployment taxes for the State of Indiana. He filed a quarterly State gross tax on Zizzo's operation. He obtained the information from Zizzo, and from the information on the payroll, which he picked up weekly.

At this point, the government introduced, and the Court accepted into evidence, Exhibits 1, 2, 3 and 4, over the

objection of the defendants, and published the same to the jury.

So far as Government Exhibit 1 is concerned, the witness Duncan testified that he secured the information on it from Frank Zizzo, who gave to him the individual applications of his agents, with their names and addresses thereon.

Over the objection of the defendants, Government Exhibits 5, 6, 7 and 8 were admitted. These were the employer's quarterly federal tax returns for withholding. Schedule A, attached to these returns, also listed the three co-defendants and other persons as employees. Forms WH-1 and WH-3, which are gross income tax returns for the Indiana State Revenue Department, were also identified and introduced into evidence, over objection.

On cross-examination Duncan said that he filled out all the various returns, because the law required that they be filed, and Mr. Zizzo wanted to file all the returns that he should, in order to comply with the law. The Court refused to permit this witness to testify that, with reference to the remittance of gambling tax returns, there were no delinquencies nor monies due on the gambling activities (App. 146-8).

## REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

I. This decision is in direct conflict with the principles announced by this Court in *Boyd* v. *U. S.*, 116 U. S. 616 and recently affirmed by this Court in *Malloy* v. *Hogan*, 378 U. S. 1 and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, as the opinion of the Court of Appeals below states "We think *Karigher* and *Lewis* stand for the proposition that the privilege of self-incrimination does not render incompetent as evidence in formation which the law has compelled in the past." Thus,

the Court below has interpreted this Court's language in *Karigher* and *Lewis* that "Under the registration provisions of the Wagering Tax, appellee is not compelled to confess to acts already committed," to mean that the past registration in July 1961 to engage in a wagering occupation, could be lawfully used as evidence of intent to engage in such unlawful conduct proscribed by a statute passed three months later in September, 1961. Such an interpretation is not only in conflict in principle with this Court's repeated decisions on compelled self-incrimination cases, but contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

II. The decision below and others similarly decided in other circuits have effectively made prisoners in the several states of any persons engaged in certain activities, to wit, gambling, narcotics, prostitution and untaxed liquor activities, within the states in which said local activities are committed. There are involved herein important questions of federal law involving the Ninth Amendment to the Constitution of the United States and the privileges and immunities of the citizens of states and the United States.

I.

This Court held in *U. S.* v. *Karigher*, 345 U. S. 22 and in *Lewis* v. *U. S.*, 348 U. S. 419 that the registration provisions of the Wagering Tax Act did not compel the registrant to confess to acts already committed. Thus any person who engaged in wagering activities could not have availed himself of the privilege of self-incrimination as a result of this Court's holding in those two cases.[1]

1. One of the arguments of the government which it used to persuade this Court to sustain the constitutionality of the Wagering Tax Act was that wagering was not forbidden by any Federal law. See Footnote 1 in dissenting opinion of Mr. Justices Black and Douglas in *Lewis* v. *U. S.*, 348 U. S. 419, at 423.

These defendants in July of 1961 filed under the Wagering Tax Act an intention to engage in wagering activities for the period July 1961 through July 1962 and furnished the required information. On September 14, 1961, less than three months later, 18 U. S. C. 1952 became effective. This statute makes a felony of interstate travel with intent to engage in unlawful activity, which is gambling, among other things.

The government had been investigating gambling activities of these defendants prior to the passage of the travel law and, after its effective date, continued investigation which led to the instant indictment and conviction.

Over the objection of these defendants, who made a timely motion to suppress the compelled registration statements which motion was denied, the government introduced the compelled registration as evidence of intent to engage in wagering, and further, as crucially important proof that Zizzo knew that the other three defendants lived in Illinois and traveled short distances to go to work in Indiana at the various "handbook" establishments.

On review the Court of Appeals below held this use of the registration statements to be proper and not in violation of the defendants' rights under the Fifth Amendment to the United States Constitution.

The Court said:

> "We think *Karigher* and *Lewis* stand for the proposition that the privilege against self-incrimination does not render incompetent as evidence information which the law has compelled in the past."

It is the defendants' position that this Court meant exactly what it said in both *Karigher* and *Lewis* that "Under the registration provisions of the Wagering Tax, Appellee is not compelled to confess to acts already committed." The Court of Appeals below fails to see the real

problem. The subsequent passage of the "interstate travel with intent" law placed these defendants in a position where the *then* compelled information was the instrument of conviction of the later law. When this Court made the above statement however, there was no 18 U. S. C. 1952. Defendant can only speculate about the impact of this statute on the Wagering Tax Act.

The decision of the Court of Appeals is absolutely contrary to this Court's holding in *Boyd* v. *U. S.*, 116 U. S. 616. The *Boyd* case held that any compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime is within the condemnation of the Fourth and Fifth Amendments. The recent decisions of this Court in *Mapp* v. *Ohio* (367 U. S. 643); *Malloy* v. *Hogan* (378 U. S. 1); and *Murphy* v. *Waterfront Commission of New York Harbor* (378 U. S. 52) reaffirm the principles of *Boyd*. In the judgment of the defendants, however, the impact of these three cases is significant when considered with yet another decision by this Court.

In *Irvine* v. *California*, 347 U. S. 128, a case decided after *Karigher* but before *Lewis*, this same problem was involved. There the State of California secured a conviction by the use of a registration statement filed by the defendant pursuant to the Wagering Tax Act. This Court followed *Wolf* v. *Colorado*, 338 U. S. 25 and said that in a prosecution in a State Court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. A dissent in *Irvine* by Mr. Justice Black, with whom Mr. Justice Douglas concurred held that in a Federal prosecution this use of the registration statement would be a violation of the Fifth Amendment (347 U. S. 128, 139). Another dissent by Mr. Justice Frankfurter, joined by

Mr. Justice Burton indicated that *Irvine* should have been reversed for violation of Due Process (347 U. S. 128, 142).

We submit that *Mapp* v. *Ohio* (367 U. S. 643); *Malloy* v. *Hogan* (378 U. S. 1); and *Murphy* v. *Waterfront Commission of New York Harbor* (378 U. S. 52) differ from the majority opinion in *Irvine* to the extent that under the present state of the law on that subject this Court would probably not follow *Wolf* v. *Colorado*, 338 U. S. 25, in the view of the petitioners. Whether the Court would follow the dissent is of course also conjectural. In any event, these petitioners submit that the use of the compelled registration information constitutes a direct violation of and conflict with the principles of *Boyd* v. *U. S.* (116 U. S. 616), and subsequent cases adhering to said principles.

It is important that in this case the Court exercise jurisdiction to put at rest the questions here presented. They are significant, serious, and of wide interest.

## II.

This Court should exercise its supervision in this case because of the important issues raised. They involve violations of the Tenth Amendment to the Constitution of the United States and the privileges and immunities of the citizens of states and the United States.

The Tenth Amendment to the Constitution of the United States reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

These defendants have contended that the government's prosecution of them in this case and their interpretation of their powers and responsibilities under 18 U. S. C. 1952 constitutes a violation of this Amendment. Enforcement

of gambling laws within a state is a matter within the police power of the state. Parenthetically it should be noted that in closing argument the prosecution over the objection of the defendants argued in effect that since the people of Indiana including the jurors and their local police officers did not do anything about gambling locally, the federal prosecutors came from Washington to correct the problem. These defendants have asserted that the impact of the registration requirements of the Wagering Tax Act and 18 U. S. C. 1952 combine to enable the federal government to intervene in purely local gambling offenses. This Court should also be aware of the fact that under the laws of the State of Indiana the gambling offenses described in the indictment are misdemeanors, but by charging that three of the four defendants left their homes in Calumet City, crossed State Line Avenue into the contiguous community of Hammond, the prosecutors raised the offenses of four defendants to the grade of felonies.

This Court has seen fit to protect the Constitutional right to travel, stating that freedom of travel is a Constitutional liberty closely related to the rights of free speech and association. The defendants questioned below whether casual incidental travel between home and employment can be the basis of federal prosecution and conviction. The defendants have contended that the mere going to and from the place of abode and the gambling establishment is not within the purview of the statute. There is no evidence that the travel in any way aided or facilitated the unlawful operation in the State of Indiana. Nothing was brought across the State Line including money, bets or wagering paraphernalia. The travel involved was incidental to working in a bookmaking establishment, coming to work in the morning and returning to his home and family in the evening. Six other employees who resided in Indiana were not prosecuted.

The necessary effect of the government's interpretation of this statute would be to imprison all persons engaging in any of the four enumerated unlawful activities within the states in which such activities were taking place. Such a person could leave the state for a vacation but if upon his return he intended to resume his unlawful activities and thereafter did engage in said activities, he would subject himself to prosecution and conviction of a felony. We urge the Court that this case involves serious questions concerning the privileges and immunities of citizens of states and of the United States. This Court is urged to exercise its supervision and grant the Writ of Certiorari to the end that these serious and substantial problems be resolved by this Court.

It is respectfully submitted that so long as on track betting is legal in many of the states, the incidence of off track gambling will be substantial. These defendants are not in possession of statistical data on the number of cases brought in the District Courts relative to persons who were charged with the failure to comply with the requirements of the Wagering Tax Act. The number of cases, however, which have been brought under 18 U. S. C. 1952 in prosecution of persons engaged in off track wagering is on the increase. Statistics on these cases are not available to these defendants but they are substantial in number. It is urged upon this Court that the predicament of these petitioners is not unlike the "whipsaw" which the Court eliminated in the *Malloy* v. *Hogan*, 378 U. S. 1 and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 cases. The case at bar confronts this Court with another "whipsaw" which is becoming all too prevalent in the District Courts of the United States. If you fail to register you are prosecuted. If you do register you dare not leave the state, or dare employ anyone who *might* visit out of state, because the information which you are compelled to

give under one law is evidence or a "link in the chain" of evidence under the other law. This Court should exercise its supervision to resolve the serious and substantial questions involved.

## CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH,
EDWARD J. CALIHAN, JR.,
*Attorneys for Petitioners.*

# APPENDIX.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 14411 September Term and Session 1964.

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* FRANK NICK ZIZZO, ALEXANDER STASNICK, HUGO A. LAZZARESCHI and WALTER WOJCIECHOWSKI, *Defendants-Appellants.* | Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. |

October 19, 1964

Before HASTINGS, *Chief Judge,* DUFFY and SWYGERT, *Circuit Judges.*

DUFFY, *Circuit Judge.* The defendants were indicted in a twenty-count indictment. Counts 2 through 19 charged violations of Sections 1952 and 2, Title 18, U. S. Code, in that they did travel in interstate commerce with intent to carry on an unlawful activity, to-wit: gambling and aiding and abetting the same.

Count 1 charged the defendants with conspiring to violate Section 1952, Title 18 U. S. Code. However, all defendants were acquitted of this charge at the close of the evidence.

Count 20 charged a violation of Sections 203 and 501, Title 47, U. S. Code. This charge was dismissed on motion of the Government.

Counts 10, 11 and 12 were dismissed by the Court on motion of the Government at the close of the Government's evidence.

The jury returned verdicts convicting defendant Zizzo on Counts 2 through 9, and 13 through 20; defendant Stasnick on Counts 2 through 8; defendant Lazzareschi on Counts 17 through 19, and defendant Wojciechowski on Count 9 and Counts 13 through 16.

In 1961, defendant Zizzo operated a gambling business (referred to as "bookmaking") at various addresses in Indiana. Zizzo did not leave the state of Indiana in connection with the operation of his business.

The co-defendants of Zizzo were employees in the operation of his gambling business. They took bets for Zizzo at various locations in Hammond, Indiana, such as South Shore Recreation, Hessville Recreation, Wright's Inn and Nardi's. Bets were often phoned in to Zizzo who maintained headquarters in a back room at Nardi's Confectionery, 119th Street, Whiting, Indiana.

As required by Indiana law, Zizzo filed Indiana Employers' Withholding Tax Return Forms. For 1961, this return listed Wojciechowski, Lazzareschi and Stasnick as Illinois residents. A similar return for 1962 gave Illinois addresses for Wojciechowski and Lazzareschi.

In July 1961, Zizzo signed and filed a Federal Wagering Tax Registration form which stated that Wojciechowski lived at a Chicago, Illinois address. Places that Zizzo rented in Hammond were listed as the resident address of two of the co-defendants. Zizzo paid the tax for nine employees including Stasnick, Lazzareschi and Wojciechowski.

In May 1962, Wojciechowski told an FBI agent his true

address was in Chicago but that he used a designated address in Hammond at the suggestion of his employer. The testimony also showed that Stasnick informed an FBI agent that he used an Indiana address while actually living in Chicago.

Defendants vigorously attack the constitutionality of 18 U. S. C., Sec. 1952. They urge that the statute, if construed broadly, constitutes an exercise of power not delegated to the United States, and violates the privileges and immunities of the citizens of the states and of the United States. They also argue the statute is unconstitutionally vague.

18 U. S. C. § 1952 provides, in pertinent part, as follows:

"Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

* * * * * * * * *"

The theory of the Government as to the conviction of Zizzo is that the proof clearly established that Zizzo's gambling operations in Indiana were the inducement for the interstate travel of his employees who lived in Illinois; that Zizzo thus aided and abetted his three co-defendants in that travel and in their engaging in illicit gambling operations in Indiana; that when they crossed the Illinois-Indiana state line, they had the requisite intent to engage in the illegal activity, and that they did, in fact, as employees of Zizzo, receive moneys placed on bets, and did telephone bets to Zizzo's headquarters.

The theory of the Government as to the conviction of defendants Stasnick, Lazzareschi and Wojciechowski is that they were residents of Illinois and travelled in interstate commerce with the requisite intent of assisting Zizzo in carrying on the promotion of an unlawful activity, to-wit: a gambling operation, in the state of Indiana.

The principal arguments of the defendants are: 1) the statute is unconstitutional; 2) that certain documents which were filed pursuant to one federal statute were used as incriminating confessions in a prosecution under another federal statute; 3) that the court erred in denying a motion to suppress such evidence; 4) that innocuous travel by three defendants to and from their homes was inconsequential to the conduct of the unlawful activity and was not within the prohibition of the statute; 5) that the Government prosecutors were guilty of prejudicial misconduct in expressing opinions as to the guilt of the accused; 6) that defendants were entitled to examine the master FBI report; and 7) the Court erred in refusing to give certain instructions.

We hold the statute here under consideration is constitutional. We think the Congress had the power, under the Commerce Clause, to make it unlawful to travel from one

state to another to promote a gambling enterprise which was illicit by the laws of the state where the gambling was carried on.

On April 18, 1961, Bill S 1653[1] was introduced in Congress largely at the instigation of the Attorney General. Its title was "Interstate and foreign travel in aid of racketeering." This bill provided that it would be an offense for anyone to travel in interstate or foreign commerce with intent to commit any act proscribed in the statute. The bill did not require that any act be committed subsequent to the interstate travel. An amendment was adopted providing that a person who travels interstate and who "thereafter performs or attempts to perform" an act pursuant to the evil intent proscribed, would be punished. The title of the bill was changed to "Interstate and foreign travel or transportation in aid of racketeering enterprises." (S. Rep. No. 644, 87th Cong., 1st Sess., p. 2.)

The Committee report quoted from the testimony of the Attorney General before the Committee. From this it appears the purpose of the bill was to curtail those involved in gambling, narcotics, prostitution and several other crimes, by making unlawful interstate travel in furtherance of such activities. The report quoted the Attorney General—"Obviously we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise" (Id., p. 3).

In the instant case, all of the defendants were involved and connected with a continuing business enterprise which was illegal under the laws of the state of Indiana.

Zizzo strongly contends he personally did not travel in interstate commerce in running his business, and that he did not have anything to do with the interstate travel of

1. The identical House Bill was H. R. 6572.

the other defendants. He argues he did not aid nor abet the interstate travel of his co-defendants and, in fact, did not know that such interstate travel occurred.

A somewhat similar contention was made in *Bass* v. *United States*, 8 Cir., 324 F. 2d 168. Bass and four of his employees lived in Tennessee. The gambling house which Bass operated was located across the river in the state of Arkansas. Bass and his employees travelled to and from their homes in Tennessee to the gambling establishment in Arkansas. There was no direct evidence that Bass aided or abetted or caused or induced his employees to travel interstate, or that he sought them out and procured them to work for him. Bass argued that each of the four employees crossed the state line of his own volition. The Eighth Circuit upheld the convictions and concluded ". . . that Bass actually furnished the four with employment and thus induced their interstate movement." *Bass* v. *United States*, 324 F. 2d 168, 171.

Here, it is undisputed that defendants Stasnick, Lazzareschi and Wojciechowski travelled almost daily from Illinois to Indiana to assist and promote the bookmaking activities of Zizzo. It is clear that the gambling business operated by Zizzo caused the interstate travel by the three employees. In the Federal Wagering returns and the Indiana tax returns signed by Zizzo, he gave Illinois addresses for his three employees who are co-defendants. A jury could properly infer that Zizzo knew the homes and places of residence of these three employees were in the state of Illinois.

Defendants contend that since Zizzo was required, by law, to file returns, their use as evidence in the instant case violated the privilege against self-incrimination. Defendants cite the dissenting opinions in *United States* v. *Kahriger*, 345 U. S. 22, and *Lewis* v. *United States*, 348 U. S. 419.

Two of the three Justices who dissented in *Kahriger* and *Lewis* are still on the Court. However, as far as we are advised, the Supreme Court has never adopted the views expressed in the dissenting opinions as the view of the Court. We think *Kahriger* and *Lewis* stand for the proposition that the privilege of self-incrimination does not render incompetent as evidence, information which the law has compelled an individual to furnish in the past.

In early 1961, the FBI began an investigation of defendant Zizzo, a person who was reputed to be involved in bookmaking activities. In July 1961, Zizzo registered and paid for himself and his employees, the federal occupational tax imposed on wagering. This form disclosed that Wojciechowski lived in Illinois. It also showed Indiana addresses for Lazzareschi and Stasnick, but other evidence showed these Indiana addresses were not residences but places where bookmaking operations were conducted. In September 1961, the instant statute was enacted.

At the trial, the occupational tax returns were introduced in evidence to show defendant Zizzo knew that Wojciechowski lived in Illinois and, as circumstantial evidence, that Zizzo knew that Stasnick and Lazzareschi did not live at the Indiana addresses listed on the return.

We think pertinent is a statement of the Supreme Court in *Lewis* v. *United States,* 348 U. S. 419, 422—"If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment."

We hold that it was not error to receive the returns in evidence, and that defendant Zizzo was not deprived of any of his constitutional rights thereby.

Agent Doyle, the agent in charge of the FBI investigation, was the last of seven FBI agents to testify. At the conclusion of his direct examination, defendants asked for "compliance with 3500."[2]

The Government turned over to defendants the statements covering the interviews with Stasnick and Wojciechowski, the only reports Doyle had made of the interviews. The Government also turned over eighteen log reports—original notes—and six statements on forms known as FD 302 which were memoranda prepared from the logs. Defendants then demanded the right to examine the entire seven investigative reports. The trial judge examined these reports in camera, utilizing some two hours in so doing. He compared the investigative reports with the FD 302 forms and the logs that had already been produced. The trial judge stated he was unable to find any matters other than copies of the originals which already had been produced.

"Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." *Palermo* v. *United States*, 360 U. S. 343, 352.

We hold it was not error for the trial court, after examining the investigative reports, to deny defendants' motion to examine same.

In the final argument, attorney for the Government asserted that every society regulated gambling "because gambling is power, and you get that power, you get that political power. . . ." Defendants' counsel interrupted with an objection, and the trial court sustained the objection and denied a motion for a new trial. Later, the prosecutor referred to parasites who "are stealing . . . from every one of

2. Defendants undoubtedly referred to 18 U. S. C. § 3500 and it was so understood by all concerned.

you." When defendants objected to the reference to stealing, the trial court not only sustained the objection but instructed the jury to disregard the remark. Considering that a cautionary instruction was given, we hold, under the facts of this case, that neither of the prosecutors' remarks hereinbefore described constitutes a basis for reversal.

Defendants urge that there were errors in the instructions. We have carefully examined these contentions and find them to be without merit.

We hold it was permissible for the jury to infer from the evidence that Zizzo's gambling operations in Indiana were the inducement for the interstate travel by Stasnick, Lazzareschi and Wojciechowski; that Zizzo knew his co-defendants lived in the state of Illinois and to carry out the duties of their employment, they would necessarily have to cross the Illinois-Indiana state line; that Zizzo thus aided and abetted the three in their almost daily interstate travel in order to promote, carry on and facilitate the unlawful gambling activity in Indiana.

Defendants have advanced several other arguments but we do not consider that they merit discussion.

As the verdicts were supported by substantial evidence, the District Court correctly denied the motion for acquittal, and the judgments of conviction must each be and are

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

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Monday, October 19, 1964.

Before
Hon. John S. Hastings, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge.

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| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* | Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. |
| No. 14411 *vs.* | |
| FRANK NICK ZIZZO, ALEXANDER STASNICK, HUGO A. LAZZARESCHI and WALTER WOJCIECHOWSKI, *Defendants-Appellants.* | |

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

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Wednesday, December 16, 1964.

Before
Hon. John S. Hastings, Chief Judge,
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge.

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
*vs.*
FRANK ZIZZO, *et al.*,
*Defendants-Appellants.*

No. 14411

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

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IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 834

FRANK NICK ZIZZO, ALEXANDER STASNICK, HUGO A. LAZZARESCHI AND WALTER WOJCIECHOWSKI, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 23-31) is reported at 338 F.2d 577.

### JURISDICTION

The judgment of the court of appeals was entered on October 19, 1964. A petition for rehearing was

denied on December 16, 1964. The petition for a writ of certiorari was filed on January 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in a prosecution under a criminal statute enacted in September 1961 which punishes participation in a gambling business illegal under State law by persons who have travelled interstate for that purpose, the introduction into evidence of a July 1961 wagering tax return violated the privilege against self-incrimination.

2. Whether Congress may prohibit travel in interstate commerce to promote a gambling enterprise illegal under State law.

## STATUTE INVOLVED

18 U.S.C. 1952 (75 Stat. 498) provides in pertinent part:

> Interstate and foreign travel or transportation in aid of racketeering enterprises.
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, man-

agement, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

## STATEMENT

A twenty-count indictment returned in the United States District Court for the Northern District of Indiana charged that petitioners traveled in interstate commerce with intent to carry on an illegal gambling enterprise and thereafter carried on this unlawful activity in violation of 18 U.S.C. 1952 and 2 (R. 5-18). After a jury trial, petitioners were convicted.* Petitioner Zizzo was sentenced to concurrent terms of imprisonment for five years and fined

* Before the case was submitted to the jury, counts 1 and 20 (conspiracy counts), and counts 10 and 12 (substantive violations) were dismissed. The jury returned guilty verdicts upon the remaining counts. Under these counts Zizzo was charged under counts 2 through 9, and 13 through 19; Stasnick under counts 2 through 8; Lazzareschi under counts 17 through 19; and Wojciechowski under counts 9 and counts 13 through 16.

$10,000 (R. 337); petitioners Stasnick, Lazzareschi and Wojciechowski were each sentenced to concurrent terms of imprisonment for two years with service of eighteen months of their sentences suspended (R. 338-341).

In 1961 and 1962, petitioner Zizzo operated a bookmaking business in Indiana (R. 106) which employed petitioners Stasnick (also known as Strosky), Lazzareschi and Wojciechowski (R. 167-168, 177-178, 235-236, 240-241). At various times between January and April 1962, Stasnick, Wojciechowski and Lazzareschi were observed driving from Illinois to gambling houses operated by Zizzo in Indiana. Stasnick would drive from Calumet City, Illinois (R. 211, 224-230), and Wojciechowski (R. 206, 211-214, 230-233) and Lazzarescki from their residences in Chicago (R. 202-203). There was evidence that all petitioners accepted wagers in Indiana (R. 151-156, 161, 163-165, 178, 236-237).

In May 1962, Wojciechowski informed an F.B.I. agent that his residence was in Chicago but that he used an Indiana address at the suggestion of his employer (R. 240). Stasnick also told an F.B.I. agent that he used an Indiana address while actually living in Calumet City (R. 238).

On the question whether Zizzo caused or knew of the interstate travel by the others for gambling purposes, the government introduced a federal wagering tax return filed by Zizzo in July 1961. He had there stated that Wojciechowski, an employee, lived at an address in Chicago, Illinois. Places that were rented and used in his gambling

business in Indiana were given as the resident addresses for Lazzareschi and Stasnick, (R. 319-328, 122-124; Government exhibits 1 through 4). In Indiana employer's withholding tax returns for 1961 Zizzo listed Wojciechowski, Lazzareschi and Stasnick as Illinois residents, and in his 1962 return he reported Illinois addresses for Wojciechowski and Lazzareschi (R. 140-143).

## ARGUMENT

1. Petitioners were prosecuted under a statute first enacted in September 1961, making it a crime to travel from one State to another for the purpose of engaging in a gambling enterprise illegal under the laws of the second State. They claim that the introduction in evidence of federal wagering tax returns filed by Zizzo in July, 1961, violated Zizzo's privilege against self-incrimination.

The privilege against self-incrimination, however, has application only to information which is incriminating at the time it is furnished. It does not protect a person from the use of information which he has disclosed in the past when he subsequently commits a crime. Thus, information in a form compelled by law to be filed, such as an income tax return, can be used in a criminal prosecution committed after the return is filed. Here petitioner Zizzo was not forced to confess a federal crime; he was not prosecuted for gambling nor for any gambling activities before the returns were filed. Rather, he and the other petitioners were prosecuted for traveling in interstate com-

merce after September 1961 for the purpose of furthering an illegal gambling business. When the interstate travel statute was enacted in September 1961, petitioners had the option either to continue wagering subject to this enactment or to discontinue their gambling activities. Indeed, Zizzo might have simply replaced his out-of-State employees with local assistants. The disclosures in the July 1961 returns that Zizzo intended to gamble in the future and that he knew that some of his employees lived in Illinois did not give petitioners any special immunity to ignore the limitation that Congress subsequently placed on interstate travel tied to gambling activities. Accordingly, their non-compliance with the condition that Congress imposed did not render this evidence inadmissible. See *United States* v. *Kahriger*, 345 U.S. 22 and *Lewis* v. *United States*, 348 U.S. 419.

2. The statute here involved is designed to prevent interstate travel to facilitate illegal gambling, as well as prostitution, narcotics traffic and the illegal distribution of liquor. We think it clear that Congress had the power, under the Commerce Clause, to enact such legislation. What this Court said in *Brooks* v. *United States*, 267 U.S. 432, 436-437, in upholding the act prohibiting the interstate transportation of stolen vehicles (18 U.S.C. 2312), is applicable here: "The objection to the Act cannot be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the

people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce" See, also, *Hoke* v. *United States*, 227 U.S. 308, and *Caminetti* v. *United States*, 242 U.S. 470. Nor does it matter whether the gambling enterprise is, in most respects, a purely local operation. See *Heart of Atlanta Motel, Inc.* v. *United States*, decided December 14, 1964. The statute does not prevent anyone from traveling interstate; it merely prohibits travel for the specific purpose of engaging in a gambling operation.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
*Attorneys.*

FEBRUARY 1965

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

**No. 834**

FRANK NICK ZIZZO, ALEXANDER STASNICK, HUGO A. LAZZARESCHI AND WALTER WOJCIECHOWSKI,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## REPLY BRIEF TO GOVERNMENT'S BRIEF IN OPPOSITION.

MAURICE J. WALSH,
*Attorney for Frank Nick Zizzo.*

and

EDWARD J. CALIHAN, JR.,
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105 West Adams Street,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

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**No. 834.**

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FRANK NICK ZIZZO, ALEXANDER STASNICK, HUGO A. LAZZARESCHI AND WALTER WOJCIECHOWSKI,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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## REPLY BRIEF TO GOVERNMENT'S BRIEF IN OPPOSITION.

---

*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners herein make this their reply to the brief for the United States in opposition to the petition for certiorari to the United States Court of Appeals for the Seventh Circuit.

At page 4 of the brief in opposition at paragraph 2 the Government states that:

> "In May 1962, Wojciechowski informed an F.B.I. agent that his residence was in Chicago but that he used an Indiana address at the suggestion of his employer (R. 240). Stasnick also told an F.B.I. agent that he used an Indiana address while actually living in Calumet City (R. 238)."

These statements, of course, were not admissible against Zizzo. The trial court held that the Government had failed to prove the conspiracy alleged in Count 1 of the indictment. Consequently, if admissible at all, it was only admissible against the declarants. Mr. Duncan, Zizzo's accountant, prepared the returns, Government's Exhibits 1, 2, 3 and 4, as well as the Indiana returns and Zizzo merely signed them. Thus, at best, the proof against Zizzo is only a form of constructive knowledge in a case where specific intent is the gist of the crime.

Turning to the argument of the Government, the petitioners respectfully point to the proposition in the Government's brief that the privilege against self-incrimination only applies to information which is incriminating at the time it is furnished. The Government refuses to recognize that the information when furnished was *incriminating*. It was incriminating under Indiana law. In *Irvine* v. *California*, 347 U. S. 128, the state secured a conviction by the use of a registration statement compelled by the provisions of the Wagering Tax Act. By reason of *United States* v. *Kahriger*, 345 U. S. 22, and *Lewis* v. *United States*, 348 U. S. 419, this Court had placed the petitioners in the case at bar in a position where they could not avail themselves of the privilege against self-incrimination, in July of 1961. However, when the new law was passed, in September, 1961 proscribing interstate travel with intent to commit certain state offenses, this same compelled registration was the crucial link in the chain of proof of intent to commit the state offense, so necessary for a conviction in this case. Under this Court's recent holdings in *Malloy* v. *Hogan*, 378 U. S. 1, and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, reaffirming the Court's decision in *Boyd* v. *U. S.*, 116 U. S. 616, such compelled evidence can not be admissible in any proceedings.

Only one other point requires comment. It is based upon a statement in the Government's brief, page 6, lines 6 and 7, as follows:

> "Indeed Zizzo might have simply replaced his out-of-state employees with local assistants."

The petitioners respectfully submit to the Court that on appeal one of the principle contentions of the petitioners was that their short travel to and from their homes and families was innocuous, casual and had no impact on the bookmaking activities. Obviously it was a matter of no concern to Zizzo where his employees lived. The Government herein concedes the inconsequential effect of their living in Illinois and traveling to Indiana on the gambling activities. This is not a case where the spirit of the law has been violated. "It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul." Civil Rights Cases, 109 U. S. 3, 26.

## CONCLUSION.

As Mr. Justice Jackson once observed in a dissenting opinion in *Lutwak* v. *United States,* 344 U. S. 604, 620:

> "Whenever a court has a case where behavior that obviously is sordid can be proved to be criminal only with great difficulty, the effort to bridge the gap is apt to produce bad law."

For the foregoing reasons it is respectfully submitted that this Court grant the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Maurice J. Walsh,
Edward J. Calihan, Jr.,
*Attorneys for Petitioners.*